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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDREW MICHAEL DE LOS  
SANTOS,

Defendant and Appellant.

E064715

(Super.Ct.No. INF1200725)

OPINION

APPEAL from the Superior Court of Riverside County. Anthony R. Villalobos,  
Judge. Affirmed with directions.

Sharon G. Wrubel, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney  
General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, and Felicity  
Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

# I

## INTRODUCTION

Defendant Andrew Michael De Los Santos admitted that he and another man, Luis Raul Diaz,<sup>1</sup> drove their friend, Shayne Ayala, to a remote desert location where he was executed by a shot in the head. A jury convicted defendant of murder (Pen. Code, § 187, subd. (a))<sup>2</sup> with the special circumstance of kidnapping. (§§ 190.2, subd. (a)(17)(B), and 207). The court sentenced defendant to life imprisonment without the possibility of parole.

On appeal, defendant argues he received ineffective assistance of counsel (IAC) because defendant's trial counsel did not object to evidence about defendant's possession of a rifle and ammunition, and a past shooting in self-defense. We hold the admission of such evidence was harmless. We agree with the parties the parole revocation fine of \$10,000 (§ 1202.45) should be stricken and the abstract of judgment corrected to show custody credits of 1,304 days.<sup>3</sup> Subject to those modifications, we affirm the judgment.

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<sup>1</sup> This court affirmed Diaz's felony murder conviction in *People v. Diaz* (Jan. 22, 2016, E062324) [nonpub. opn.]

<sup>2</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>3</sup> Defendant waived any objection to the reference to the death penalty in the probation report. (*People v. Welch* (1993) 5 Cal.4th 228, 234-235.)

## II

### BACKGROUND

Ayala's sister last saw her brother in June 2011. She reported him missing on September 2, 2011, after he stopped responding to her texts in August.

On December 19, 2011, some desert hikers found skeletal remains in an uninhabited area of Sky Valley, in a small ravine about 2.4 miles from the intersection of Thousand Palms Road and Dillon Road. The remains were scattered at two burn sites, and included a charred T-shirt and plastic cup, a live ammunition round, a melted belt buckle, and a fired projectile fragment.

Ayala was identified from dental records and DNA analysis of the remains. The coroner determined the cause of death was homicidal violence, not otherwise specified. A small defect in the skull was consistent with a gunshot wound.

Defendant was Ashley Prieto's friend and drug supplier. Prieto used methamphetamine and heroin daily between August and October 2011. She had been in drug rehabilitation many times, including a year as an inpatient, and she was in rehabilitation at the time of her trial testimony in August 2015. She also had a misdemeanor conviction for shoplifting, a felony conviction for possession of OxyContin for sale, and a pending felony charge for possession of stolen property.

Prieto met Ayala and Diaz through defendant. They all used and sold drugs together. Prieto disliked Diaz although she had bought heroin and methamphetamine from him.

The last time Prieto talked to Ayala, he said he was driving with defendant and Diaz to Las Vegas, where their drug supplier was located. Ayala sounded happy and excited.

In October 2011, Prieto attended a party in Palm Springs where she and defendant used drugs and defendant talked about Ayala's death. Defendant believed Ayala had been involved in an incident in which Brittany Brown, defendant's girlfriend, was tied up and robbed. Defendant boasted to Prieto that he and Diaz had driven Ayala to the desert, where Ayala was shot in the head.

On December 28, 2011, Prieto told sheriff's deputies about her conversation with defendant. Prieto said Diaz and defendant had taken Ayala to the desert and defendant had shot Ayala in the head. Prieto said she hated defendant enough to kill him.

Defendant and Brown, his girlfriend, had lived in a condominium in Cathedral City from July 2011 to September 2011, when they vacated without notice. The carpet had been damaged and a piece was cut out; a large bedroom mirror had been broken; and some areas of the carpet were stained a pinkish color. Damage to the front door jamb was consistent with somebody kicking in the door. Portions of the carpet were tested for DNA but no usable DNA was found.

On February 15, 2012, a search warrant was served for defendant's Dodge truck. Various boxes of different types of shotgun ammunition were found in the truck, and shotgun shells were on the floor in the rear passenger area.

On March 29, 2012, a search warrant was served on an apartment in Palm Springs, where defendant was living with his sister. Under the bed, there was an unloaded rifle

with an attached scope and a tripod. Various boxes of different caliber bullets were underneath the dresser. One type was .40-caliber ammunition used for a handgun.

### *Defendant's Interrogation*

Defendant was arrested and interrogated at length by Officer Martin Alfaro. Defendant admitted the rifle found in the search was his. Defendant stated he had lived in Indio in the Park Apartments, where Brown had been tied up and robbed, and then the Cathedral City condominium, which they had left because of noise complaints. At first, defendant said he had been friends with Ayala but he did not know Ayala had participated in robbing Brown until after Ayala was missing. As a ruse, Alfaro claimed Diaz had implicated defendant but Alfaro thought Diaz, not defendant, had been the shooter. Defendant denied he had been present.

After offering a number of implausible explanations, defendant eventually said he did not shoot Ayala but he knew who did and that Ayala had it coming. Defendant recounted that he and Diaz left the condominium around 6:00 or 7:00 a.m. to acquire heroin. On their way to Indio, they picked up Ayala. On the way back, Ayala seemed to be whispering on the phone, alerting someone about their return. When they arrived, the condominium door had been kicked in. Defendant believed Ayala was responsible because only Diaz and defendant's father knew where defendant lived. Defendant's .20-gauge shotgun had been stolen. Defendant and Diaz beat up Ayala, who admitted he had arranged the attack on Brown. Diaz left with Ayala while defendant cleaned up the blood. When Diaz returned, he said he shot Ayala in Sky Valley, using a .9-caliber gun defendant had given him.

Eventually, defendant admitted he had accompanied Diaz and Ayala to the desert. While Diaz led Ayala away, defendant stayed by the car. Defendant heard three shots, and Diaz returned. Diaz insisted it had to be done.

Defendant said he had known Ayala for a year and considered him a friend. Ayala was a heroin addict who sold drugs for defendant. Defendant did not find out until they were driving that Ayala was responsible for what happened when Brown and her friend had been tied up by two men and robbed and defendant's drugs were stolen. Ayala admitted to defendant that he and Jimmy, who had lived below them, were the culprits. Defendant was also robbed at the condominium and his shotgun was taken although he recovered it later.

Lastly, defendant offered his final version of what happened. Defendant and Diaz went to Indio to buy heroin and picked up Ayala. When they returned to the condominium, the door was kicked in, which made defendant suspicious because Ayala knew where defendant lived. Drugs and defendant's shotgun were missing. Defendant and Diaz beat up Ayala who was bleeding on the carpet. Diaz discharged the .9-caliber gun, hitting a closet mirror. Ayala was told to take a shower to clean up. Defendant and Diaz used drugs and discussed taking Ayala out into the desert to beat him up and teach him a lesson.

Ayala got in the car voluntarily. Defendant did not threaten Ayala but he would not have let him leave and Ayala knew Diaz had the gun. Defendant got in the back seat with Ayala, and Diaz drove to Sky Valley, turned on Dillon, and drove out on a dirt road.

It was around 11:00 a.m. Diaz warned Ayala, “Tell the truth and you will live.” Ayala admitted that he and Jimmy had kicked in the door and also set up defendant’s girlfriend.

Defendant was shocked and angry and wanted to tie up Ayala and leave him in the desert but not kill him. When they stopped the car, Ayala took off running. Diaz pointed the gun at Ayala who came back. Diaz told Ayala to walk in front of him and defendant stayed by the car. About five minutes later, defendant heard three shots but did not see Diaz shoot Ayala. Afterwards Diaz discarded his gun, his own phone, and Ayala’s phone.

### III

#### IAC

Defendant contends that defense counsel should have objected to evidence that defendant had a rifle and various kinds of ammunition, as well as evidence that, in the past, defendant had shot someone in self-defense for trying to steal his drugs. Defendant asserts that, by failing to obtain exclusion of such evidence, counsel rendered IAC that prejudiced defendant.

The Sixth Amendment right to counsel and the Fourteenth Amendment right to due process guarantees a criminal defendant the right to effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 684-685.) The California Constitution guarantees a criminal defendant the same right, and the same principles apply. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215-217.) To establish IAC, defendant must show that counsel’s performance was deficient under prevailing professional norms, that it is reasonably probable that absent counsel’s error, the outcome would have been different

and that the error was not attributable to a reasonable tactical decision. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1157.) The failure to object to prejudicial evidence is not professionally competent. (*Ledesma*, at pp. 224-227.) However, we defer to the reasonable tactical decisions of defense counsel. (*People v. Lucas* (1995) 12 Cal.4th 415, 442; *People v. Vines* (2011) 51 Cal.4th 830, 876.)

Defendant asserts the gun used to shoot Ayala was a .9-millimeter handgun. He contends that evidence that he possessed a rifle and different kinds of ammunition months after Ayala was shot had no relevance to the charged murder. The prosecutor claimed the evidence was relevant to the motive in this case because defendant stated a shotgun was one of the items stolen when the condominium was broken into, which led to defendant's confrontation with Ayala.

Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Defendant cites two cases holding that a weapon that is not used in a crime is not relevant evidence: "Evidence of possession of a weapon not used in the crime charged against a defendant leads logically only to an inference that defendant is the kind of person who surrounds himself with deadly weapons—a fact of *no relevant* consequence to determination of the guilt or innocence of the defendant. [Citations.]" (*People v. Henderson* (1976) 58 Cal.App.3d 349, 360; *People v. Archer* (2000) 82 Cal.App.4th 1380, 1392-1393.)

A defense attorney's decisions regarding strategy and tactics must be rational and "founded upon adequate investigation and preparation." [Citations.]" (*In re Thomas*



(2006) 37 Cal.4th 1249, 1258.) Here, rather than making a relevance objection, it seems defense attorney chose to neutralize the subject evidence on cross-examination by emphasizing that it was not illegal to own guns or ammunition and, suggesting the benign reason for defendant's possession was because he loved target shooting. Furthermore, the evidence about defendant shooting someone in self-defense during a bad drug deal, rather than being prejudicial, actually gave support to defense counsel's closing argument that defendant's conduct should be considered in the context of the vicious subculture inhabited by defendant, Diaz, Ayala and their cohorts.

Notwithstanding any error, it is not reasonably probable defendant would have obtained a more favorable verdict absent counsel's performance, sufficient to undermine confidence in the outcome at trial. (*Strickland v. Washington, supra*, 466 U.S. at pp. 693-694.) In addition, prejudice is assessed in terms of the high proof requirement of guilt beyond a reasonable doubt. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." (*Id.* at p. 695.)

The evidence of defendant's guilt for murder or felony murder and kidnapping was overwhelming. Defendant admitted having participated in transporting Ayala out into the desert and executing him. In light of his admissions, defendant's possession of guns and ammunition was a fairly insignificant collateral issue. As for defendant's shooting another person in self-defense, the subject evidence was limited in duration and scope and received scant attention at trial. Hence, no IAC was demonstrated.

IV

DISPOSITION

No IAC caused prejudicial error in defendant's case. We order the trial court to strike the parole revocation fine of \$10,000 (§ 1202.45) and correct the abstract of judgment to show custody credits of 1,304 days. A corrected copy of the abstract shall be forwarded to the Department of Corrections and Rehabilitation. Subject to these modifications, we affirm the judgment.

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CODRINGTON  
J.

We concur:

RAMIREZ  
P. J.

MILLER  
J.